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## Sites v. State, 481 A.2d 192 (Md. 1984)

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**Constitutional Law—THE DRIVER'S RIGHT TO COUNSEL PRIOR  
TO TAKING A BREATHALYZER TEST—WHAT PROCESS IS  
DUE?—*Sites v. State*, 481 A.2d 192 (Md. 1984)**

**I. INTRODUCTION**

The Maryland Court of Appeals recently held that due process requires that police allow drivers the opportunity to communicate with counsel prior to submitting to a breathalyzer test.<sup>1</sup> In so holding, the court joins a small minority of jurisdictions which have found a similar right to emanate from the fourteenth amendment.<sup>2</sup> *Sites v. State* departs from these decisions, however, in its appraisal of the breathalyzer proceeding, and may provide courts with a new conceptual framework with which to approach the question of whether the right to counsel franchise should extend to the breathalyzer proceeding.

The ephemeral nature of the evidence used in chemical sobriety tests presents courts with an assortment of policy considerations to weigh in determining whether a right to counsel attaches before the administration of a breathalyzer test. Law enforcement officers, motivated by the desire to administer the test before the alcohol in the suspect's blood metabolizes away, seek to obtain test results as quickly as possible.<sup>3</sup> Yet the consequences of the test are serious,<sup>4</sup> and the advice of counsel can aid the driver in making a more informed decision as to whether to submit to the test.<sup>5</sup> This Note examines how the Maryland Court of Appeals resolved the tension between these countervailing interests in *Sites v. State* and consid-

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1. *Sites v. State*, 481 A.2d 192 (Md. 1984).

2. *People v. Gurse*y, 239 N.E.2d 351 (N.Y. 1968); *Troy v. Curry*, 303 N.E.2d 925 (Ohio Mun. Ct. 1973); *State v. Newton*, 636 P.2d 393 (Or. 1981).

3. See, e.g., Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L.J. 99, 102 n.11 (1980) ("Because alcohol dissipates rapidly in the bloodstream, it is desirable to perform sobriety tests as quickly as possible.").

4. See MD. TRANSP. CODE ANN. § 16-205(a) (1984), which provides for revocation of a driver's license when a driver is convicted of driving while under the influence of alcohol. The section also provides for revocation if the driver has had three previous convictions within a three-year period. *Id.*

5. See, e.g., *Prideaux v. State Dep't of Pub. Safety*, 247 N.W.2d 385, 390 (Minn. 1976). One commentator noted three ways in which counsel could aid the driver: (1) by ensuring that the accused receives an objective analysis of the statutory provisions affecting his particular facts and circumstances; (2) by ensuring that the accused takes advantage of his right to obtain evidence for his defense; and (3) by helping the accused make a rational decision as to whether he should submit to the test. Note, *Motor Vehicles—Due Process—Statutory Options Require Defendants Be Allowed a Reasonable Consultation with Counsel Before Intoxication Tests Are Given To Sustain Conviction for Driving While Intoxicated—People v. Gurse*y. *Opinion Evidence of Experienced Police Officers Sufficient To Sustain Speeding Conviction—People v. Olsen*, 33 ALB. L. REV. 204, 209-10 (1968).

ers some of the potential problems produced by the decision.

## II. FACTUAL UNDERPINNINGS OF *Sites*

A Howard County policeman noticed Jacob Sites driving erratically and stopped him at approximately 12:45 A.M. on May 15, 1982.<sup>6</sup> Ten minutes later, another officer read Sites "DR-15," a standardized statement of his rights under Maryland's implied consent statute.<sup>8</sup> Sites agreed to take the breathalyzer test and was driven to the Howard County Police Station.<sup>9</sup>

Sites testified at trial that after his arrival at the station he

6. Appellant's Brief at 6, *Sites v. State*, 481 A.2d 192 (Md. 1984).

7. *Sites*, 481 A.2d at 194. The formal name for the "DR-15" statement is "The Advice of Rights and Administrative Penalties for Refusal to Submit to a Chemical Test." The statutory basis for the "DR-15" statement is found in MD. TRANSP. CODE ANN. § 16.205-1 (1984). "DR-15" provides:

Any person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this state is deemed to have consented, with certain limitations, to take a Chemical Test to determine the alcohol content of his blood. Pursuant to law, I am hereby advising you that you have been stopped or detained on reasonable grounds on suspicion that you have been driving or attempting to drive a motor vehicle while intoxicated or while under the influence of alcohol. I am further advising you of your right to select the Chemical Test of your choice which are blood or breath tests to determine the alcoholic content of your blood: and, further, I am offering you such chemical test to be administered by a person examined and certified as qualified by the Maryland State Police and requesting that you submit to such a chemical test.

(1) The results of such test may be admissible and may be considered with other competent evidence in determining your guilt or innocence in any prosecution relating to your driving or attempting to drive a motor vehicle, while either intoxicated or under the influence of alcohol.

(2) That you have the right to refuse to submit to any such tests, and on your refusal, no test shall be administered.

(3) That your refusal to a chemical test shall result in the suspension of your driver's license and/or driving privilege for not less than 60 days or more than 6 months and, if you are a non-resident, such suspension may result in a subsequent suspension of your driver's license in the state of residence.

(4) That after submitting to a chemical test administered at the request of the arresting officer, you may also have a physician of your choice to administer a chemical test in addition to the one administered at the direction of the police officer. I have read or have been read the Advice of Rights for Chemical Test and have been advised of administrative penalties that may be imposed for refusal to take a chemical test. I understand that this requested test is in addition to any preliminary road-side test that was taken. Having been so advised, do you now agree to submit to a Chemical Test to determine the alcohol content of your blood? (*This is not an admission of guilt*)

*Sites*, 481 A.2d at 194 n.1.

8. *Sites*, 481 A.2d at 194.

9. *Id.* at 195.

asked police three times if he could call his attorney,<sup>10</sup> but that the arresting officer told him he had no right to counsel and refused his requests.<sup>11</sup> Although Sites' testimony was not refuted, the arresting officer could not recall at trial whether Sites ever asked permission to telephone his attorney.<sup>12</sup> At 1:25 A.M., Sites took the breathalyzer test and was formally charged with driving while intoxicated. The test revealed 0.17% of ethyl alcohol by weight.<sup>13</sup> He was later convicted of the charge.<sup>14</sup> Sites sought review by the Maryland Court of Special Appeals, but the Maryland Court of Appeals granted certiorari while the case was still pending.<sup>15</sup>

### III. THE STATUTORY CLAIM

In the Maryland Court of Appeals, Sites claimed that section 16-205.1 of the Maryland Transportation Article and section 10-309 of the Courts and Judicial Proceedings Article require that evidence of a chemical test be suppressed where a driver has been refused the opportunity to confer with counsel.<sup>16</sup> The Circuit Court of Howard County had ruled as a matter of law that Sites had no right to counsel under the circumstances and denied his motion to suppress.<sup>17</sup>

Under Maryland's implied consent statute, a driver is deemed to have consented to the administration of a chemical sobriety test if he is detained on suspicion of driving under the influence (DUI) of alcohol.<sup>18</sup> However, the driver cannot be forced to take the test,<sup>19</sup> and evidence of his refusal may not be used against him in court.<sup>20</sup> If a driver refuses to take the test, the police officer must advise him that his license will be suspended for at least 60 days.<sup>21</sup> In addition, the driver must be told that his driver's license will be suspended for a minimum of 120 days if he has previously been

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *State v. Sites*, 469 A.2d 1274 (Md. 1984).

16. *Sites*, 481 A.2d at 195.

17. *Id.* at 195.

18. MD. TRANSP. CODE ANN. § 16-205.1(a) (1984).

19. *Id.* § 16-205.1(b) (1984).

20. MD. CTS. & JUD. PROC. CODE ANN. § 10-309(a) (Supp. 1984).

21. MD. TRANSP. CODE ANN. § 16-205.1(b)(i) (1984). The arresting officer must inform the driver that if he refuses the test, his license will be suspended for not less than 60 days nor more than six months for a first offense.

convicted of driving under the influence.<sup>22</sup> The only circumstances under which the statute actually requires a driver to take the test are those where the driver has been involved in an accident resulting in a fatality.<sup>23</sup>

Section 10-309(a) of the Courts and Judicial Proceedings Article is essentially an exclusionary rule which requires that evidence obtained from a chemical sobriety test be suppressed if it is obtained in violation of the procedural requirements embodied in section 16-205.1.<sup>24</sup> Three years prior to *Sites*, the Maryland Court of Appeals, in *State v. Loscomb*,<sup>25</sup> held that sections 10-309 and 16-205 were *in pari materia*, and "must be construed harmoniously in order to give full effect to each enactment."<sup>26</sup> Thus, a procedural violation under section 16-205 triggers the application of the exclusionary rule under section 10-309.

*Sites* argued on appeal that because "DR-15" was inherently complex and confusing to the driver, sections 16-205 and 10-309(a) should be construed together to require the suppression of the results of a breathalyzer test where a driver has been refused the opportunity to speak with counsel.<sup>27</sup> Reasoning that since section 16-205.1(f)(3) provided for representation by counsel in subsequent proceedings, the court determined that the legislature never intended to create a "pretest right" and, therefore, the police had met the requirements of sections 16-205 and 10-309.<sup>28</sup>

The prohibition in section 10-309(a) of Maryland's Courts and Judicial Proceedings Article, which disallows evidence of a driver's refusal to take a sobriety test from admission at trial, is not constitutionally mandated, and many jurisdictions do not preclude the use of such evidence in DUI trials.<sup>29</sup> In *South Dakota v. Neville*,<sup>30</sup>

22. *Id.* § 16-205.1(b)(i) (1984).

23. *Id.* § 16-205.1(c) (1984). The arresting officer is to direct medical personnel in the taking of the driver's blood or breath. Medical personnel are not liable for any civil damages unless they are grossly negligent in administering a breath or blood test. *Id.*

24. *State v. Loscomb*, 435 A.2d 764 (Md. 1981). In *Loscomb*, the Maryland Court of Appeals held that the exclusionary rule of § 10-309(a) applies where police have failed to: (1) obtain affirmative consent from the driver; or (2) comply with the procedural requirements of Md. TRANSP. CODE. § 16-205.1 (1984). *Loscomb*, 435 A.2d at 768-71.

25. *Loscomb*, 435 A.2d at 764.

26. *Id.* at 768.

27. Appellant's brief at 12, *Sites v. State*, 481 A.2d 192 (Md. 1984). *Sites* contended in his brief: "It is Appellant's position that where a suspect is sufficiently impaired to provide probable cause for a drunk driving arrest, and asks for counsel, the statutes should be construed to mandate that the police assist the suspect in contacting counsel so that a knowing and intelligent choice becomes possible." *Id.*

28. *Sites*, 481 A.2d at 196.

29. Evidence of refusal was admitted at trial in the following decisions: *Hill v. State*, 366

the United States Supreme Court held that since evidence of a defendant's refusal to take a blood-alcohol test was not obtained by coercion, its admission at trial was not offensive to the fifth amendment. Thus, the *Neville* decision settled any disputes regarding the admissibility of breathalyzer refusals at trial.

Maryland drivers may benefit from the state's inability to introduce evidence of their refusal to take the breathalyzer since the state cannot impeach the driver as to why he would not take the test.<sup>31</sup> "DR-15" does not require an arresting officer to inform a driver detained under suspicion of DUI that evidence of his refusal cannot be used against him at trial.<sup>32</sup> Prior to *Sites*, many Maryland drivers may have submitted to the breathalyzer test because they were unaware of their ability to overcome the prosecution's case at trial. However, since the *Sites* decision will now require police to allow drivers the opportunity to communicate with counsel prior to taking the test, many drivers, after being enlightened by counsel that their refusal may make a conviction harder to obtain, may elect not to be tested. Indeed, refusal may seem a more attractive option since the penalties attending a DUI conviction exceed the loss of a driver's license.<sup>33</sup> Thus, Maryland may witness an increase in the number of breathalyzer refusals after *Sites*.<sup>34</sup> If this

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So. 2d 318, 325 (Ala. 1979); *Campbell v. Superior Court*, 479 P.2d 685, 692 (Ariz. 1971); *State v. Lynch*, 274 A.2d 443, 444 (Del. Super. Ct. 1971); *People v. Taylor*, 250 N.W.2d 570, 572 (Mich. Ct. App. 1977); *State v. Tabisz*, 322 A.2d 453, 454 (N.J. Super. Ct. App. Div. 1974).

30. 459 U.S. 553, 562 (1983).

31. See *Major v. State*, 358 A.2d 609, 617 (Md. Ct. Spec. App.) cert. denied sub nom. *Flanagan v. State*, 278 Md. 722 (1976). An inquiry regarding the defendant's refusal would constitute plain error. Note, *Maryland's Drunk Driving Laws: An Overview*, 11 U. BALT. L. REV. 357, 361 n.29 (1982); Cf. FLA. STAT. § 316.1932(1)(a) (Supp. 1984) ("The refusal to submit to a chemical breath or urine test upon the request of a law enforcement officer as provided in this section shall be admissible into evidence in any criminal proceeding.").

32. See *supra* note 7.

33. A DUI conviction may result in a criminal record for the driver. See *Major v. State*, 358 A.2d 609, 616 (Md. Ct. Spec. App. 1976). In *Flanagan v. State*, No. 1030, decided with the *Major* case in a single opinion, the defendant appealed a criminal conviction for DUI which had resulted in a \$500 fine and a suspended sentence of one year imprisonment. In Florida, a person convicted of driving under the influence of alcoholic beverages shall receive a punishment of "[n]ot less than \$250 or more than \$500 for a first conviction." FLA. STAT. § 316.193(2)(a)(1) (Supp. 1984). Upon a second conviction, the driver shall be fined for "[n]ot less than \$500 or more than \$1,000." *Id.* § 316.193(2)(a)(2). A third conviction carries a fine of "[n]ot less than \$1,000 or more than \$2,500." *Id.* § 316.193(2)(a)(3).

34. See generally Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935, 955 (1980). By comparing the refusal rates in Texas and Illinois the author concludes that granting drivers a pretest right to counsel results in a greater number of breathalyzer refusals. *Id.*

occurs, the Maryland Legislature may respond by removing the statutory advantage of section 10-309(a).

#### IV. THE SIXTH AMENDMENT CLAIM

The Maryland Court of Appeals rejected Sites' contention that his right to counsel under the sixth amendment and Article 21 of the Maryland Declaration of Rights was violated when police refused him the opportunity to telephone his attorney.<sup>35</sup> Because Sites was not formally charged until after he took the breathalyzer, the court of appeals concluded that his request for counsel was not made at a time "critical" enough to the outcome of his case at trial for him to claim a sixth amendment violation.<sup>36</sup> A brief review of the historical developments underlying the sixth amendment right to counsel and its subsequent expansion to pretrial proceedings will illuminate the case law which led the court of appeals to its conclusion.

##### A. *The Historical Development of the Right to Counsel in the United States*

Under English common law, a right to counsel was not recognized in cases involving felony or treason.<sup>37</sup> The right was, however, extended to persons involved in civil and misdemeanor cases.<sup>38</sup> The inherent irrationality of denying the aid of counsel in serious criminal cases where it is arguably most needed, while at the same time granting it to those charged with petty offenses, led commentators such as Blackstone to lament that the English rule was both illogical and unjust.<sup>39</sup>

The English rule was never accepted in the United States.<sup>40</sup> Prior to the adoption of the federal Constitution, twelve of the thirteen colonies had rejected the English rule and recognized a right to counsel in criminal prosecutions.<sup>41</sup> Maryland is among

35. *Sites*, 481 A.2d at 196-97.

36. *Id.* at 197.

37. *Powell v. Alabama*, 287 U.S. 45, 60 (1932). Justice Sutherland, writing for the majority, noted: "Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest." *Id.*

38. *Id.*

39. *Id.* at 60-61. Blackstone queried: "For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 W. BLACKSTONE, COMMENTARIES \*355.

40. *Powell*, 287 U.S. at 61.

41. *Id.* at 64.

those states whose acknowledgment of the right prefigured the existence of the United States Constitution.<sup>42</sup>

Another factor which contributed to the development of the right to counsel in the United States was the emergence of the public prosecutor.<sup>43</sup> At the time the American Bill of Rights was adopted, public prosecutors did not exist in England. Their introduction and growth as an institution in this country produced several important results affecting the right to counsel.<sup>44</sup> First, laymen faced an increasingly difficult task of defending themselves at trial against attorneys whose sole occupation revolved around prosecuting criminals.<sup>45</sup> Second, as the investigative powers of law enforcement and prosecutorial forces expanded, pretrial confrontations between police and the accused became increasingly likely to determine the outcome at trial.<sup>46</sup> Thus, the right to counsel has been extended incrementally backwards in time from the date of trial, and it is at this juncture that the issue of a pretest right to counsel arises.

### B. "Critical Stage" Analysis and the Chemical Sobriety Test

Modern recognition of the importance of a pretrial right to counsel originated in *Powell v. Alabama*.<sup>47</sup> In *Powell*, the Supreme Court recognized that certain indigent defendants in a capital case were entitled to the assistance of counsel regardless of whether they had requested the aid of an attorney.<sup>48</sup> After *Powell*, the main concern of the Court's sixth amendment analysis became whether the accused was denied the right to counsel at a "critical stage." In determining whether a particular stage of criminal prosecution was critical, the Court focused on the harm that the defendant would suffer if he were forced to undergo a particular stage of the pro-

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42. See *Utt v. State*, 443 A.2d 582, 584 (Md. Ct. Spec. App. 1982). The court of special appeals stated that "the constitutional right to counsel in Maryland is older than that under the Constitution of the United States." *Id.* at 584.

43. *United States v. Ash*, 413 U.S. 300 (1972). Justice Blackmun, writing for the majority, acknowledged that the public prosecutor played a significant part in changing the American rule: "Thus, an additional motivation for the American rule was a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309.

44. *Id.* at 308.

45. *Id.* at 309.

46. *Id.* at 310.

47. 287 U.S. 45 (1932).

48. *Id.* at 71. The Court limited the right to counsel to the facts of the case and declined to determine whether a right to counsel existed for other criminal prosecutions.



ceeding without the aid of counsel. Thus, in *Hamilton v. Alabama*,<sup>49</sup> the Court held that arraignment was a critical stage in the criminal proceeding since available defenses could be lost there which could affect the outcome of the entire trial.<sup>50</sup> A post indictment lineup was found to be a critical stage in *United States v. Wade*<sup>51</sup> and, similarly, a preliminary hearing was considered critical in *Coleman v. Alabama*.<sup>52</sup>

By 1972, the Court began to exhibit signs of reluctance to extend the number of pretrial settings which required the presence of counsel. In *Kirby v. Illinois*,<sup>53</sup> the Court determined that the right to counsel did not attach prior to the initiation of criminal charges.<sup>54</sup> The Maryland Court of Appeals applied *Kirby*'s reasoning and found that because Sites had not been formally charged at the time he had requested counsel, his sixth amendment right to counsel had not yet attached.<sup>55</sup>

Other courts have used the *Kirby* rationale as a basis for rejecting claims under the sixth amendment to a pretest right to counsel.<sup>56</sup> The Supreme Court of Kansas, in *State v. Bristor*,<sup>57</sup> recently concluded that an arrest for DUI does not initiate adversary proceedings of the magnitude necessary to give rise to a right to counsel. The court acknowledged its reliance on *Kirby* and con-

49. 368 U.S. 52 (1961).

50. *Id.* at 54. Justice Douglas, in discussing the critical nature of the arraignment, stated that "[a]vailable defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Id.*

51. 388 U.S. 218 (1967). The Court cited three reasons why the lineup was critical: (1) the inherent unreliability of eyewitness identification; (2) the possibility of improper suggestion by way of arrangement of the suspects; (3) the small likelihood that a witness once having identified the suspect might change his mind. *Id.* at 228-29.

52. 399 U.S. 1 (1970). The Court noted four reasons why the presence of counsel at a preliminary hearing could benefit the accused: (1) an attorney can raise fatal weaknesses in the state's case and thus avoid charges altogether; (2) an attorney can preserve testimony for purposes of impeachment at trial or preserve testimony favorable to a client of a person not testifying at trial; (3) an attorney can better discover the state's case; and (4) an attorney can provide effective arguments for the defendant on matters such as pretrial psychological examinations and bail. *Id.* at 9.

53. 406 U.S. 682 (1972).

54. *Id.* at 689. The specific issue in *Kirby* was whether to extend the exclusionary rule articulated in *Wade* and *Gilbert* to pre-indictment confrontations. The issue arose because of an identification of two robbers which occurred at a police station. The two suspects had not yet been formally charged by police.

55. *Sites*, 481 A.2d at 197.

56. See, e.g., *State v. Jones*, 457 A.2d 1116 (Me. 1983) (no right to counsel before blood test because *Kirby* restricts attachment of right to situations where defendant has already been formally charged); *State v. Newton*, 636 P.2d 393, 404 (Or. 1981) (since defendant was not formally charged, critical stage had not yet arisen).

57. 691 P.2d 1 (Kan. 1984).

cluded that deciding whether to take a blood alcohol test is not a critical stage.<sup>58</sup>

Some jurisdictions have approached critical stage analysis from a slightly different perspective than that chosen by the Maryland Court of Appeals in *Sites*. These courts<sup>59</sup> have relied heavily upon the rationale expressed by the United States Supreme Court in *United States v. Wade*.<sup>60</sup> Justice Brennan, writing for the majority in *Wade*, observed that certain pretrial confrontations between police and defendants are "preparatory steps in the gathering of prosecution's evidence" which do not necessitate the presence of counsel to prevent an unjust trial.<sup>61</sup> The majority in *Wade* did not consider blood samples a critical stage since police could do little to tamper with the evidence that could not be revealed by the defense at trial.<sup>62</sup>

The Maine Supreme Judicial Court, in *State v. Jones*,<sup>63</sup> found the *Wade* analysis germane to the breathalyzer test proceeding. After considering an extensive passage from *Wade*, the court stated that "[a]lthough the test may seem critical because its results are so persuasive at trial, the test decision is not critical in the *Wade* sense."<sup>64</sup> The court explained that the test was not critical because police could do little to prejudice the defendant's chance for a fair trial short of implementing improper testing procedures.<sup>65</sup> Since such improprieties could be dealt with at trial by defendant's counsel, they were not potentially prejudicial enough

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58. *Id.* at 6.

59. See, e.g., *Holmberg v. 54-A Judicial Dist. Judge*, 231 N.W.2d 543, 544 (Mich. Ct. App. 1975) (constitutional right to counsel has no application in breathalyzer proceeding since decision to withhold or give consent is not critical stage of criminal prosecution); *State v. Petkus*, 269 A.2d 123, 125 (N.H. 1970) (presence of counsel not required since blood test does not constitute critical stage), *cert. denied*, 402 U.S. 932 (1971); *McNulty v. Curry*, 328 N.E.2d 798, 801-02 (Ohio 1975) (blood test not critical stage for sixth amendment purposes).

60. 388 U.S. 218 (1967).

61. *Id.* at 227.

62. *Id.* at 227-28. Justice Brennan, writing for the majority, stated:

Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

*Id.*

63. 457 A.2d 1116 (Me. 1983).

64. *Id.* at 1119 n.5.

65. *Id.*

to be considered "critical."<sup>66</sup>

Although no Florida district court has addressed the right to counsel issue in the context of a breathalyzer test, several circuit courts have centered their analytic approaches to the breathalyzer question around *Wade*. In *State v. Roche*,<sup>67</sup> the state sought review of a county court judge's refusal to suspend a defendant's driver's license.<sup>68</sup> The defendant had asked to speak with his attorney prior to taking a breathalyzer test and was prevented from doing so by police.<sup>69</sup> The lower court concluded that although the defendant had no sixth amendment right to counsel, a fifth amendment right nevertheless protected him.<sup>70</sup> The circuit court summarily reversed the decision of the lower court, basing its decision on a cursory *Wade*-type critical stage analysis. One Florida commentator has noted that the circuit court's reliance on *Wade* was misplaced since the lower court's decision was premised on a fifth amendment due process theory rather than sixth amendment right to counsel grounds.<sup>71</sup>

The applicability of the *Wade* rationale to the breathalyzer context is questionable. One shortcoming of this approach is that it overemphasizes the evidentiary aspect of the test. The need to communicate with counsel prior to deciding whether to submit to a breathalyzer test is not so much to ensure that the test is fairly administered or, for that matter, to provide that the motorist be allowed to take a test independent of that provided by police. The main reason motorists need to confer with counsel is because counsel can help them decide whether it is in their best interest to take the test. One commentator has noted how confusing the circumstances surrounding the breathalyzer test can be to the driver.<sup>72</sup> Courts that have relied on *Wade* have given scant attention to the decisional aspect of the test, choosing instead to focus on whether the absence of counsel's advice will unduly prejudice the defendant at trial.

66. *Id.*

67. 1 Fla. Supp. 2d 189 (Fla. 9th Cir. Ct. 1981).

68. *Id.*

69. *Id.*

70. *Id.* at 190.

71. See Dobson, *Florida's New "Drunk Driving" Laws: An Overview of Constitutional and Statutory Problems*, 7 NOVA L.J. 179, 237 (1983).

72. See, e.g., Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L.J. 99, 109 (1980) (breathalyzer proceeding is often confusing to the driver because he is dazed and frightened; in addition, drivers are sometimes read their *Miranda* rights only to be told moments later that they have no right to an attorney).

### C. A Civil or Criminal Proceeding?

Some jurisdictions interpret the literal language of the sixth amendment as barring any pretest right to counsel.<sup>73</sup> Since the sixth amendment speaks of a right to counsel only in reference to criminal violations,<sup>74</sup> these courts have found that the civil nature of implied consent proceedings prevents the attachment of any sixth amendment right.

Two of Florida's circuit courts have adopted this theory. In *State v. Wilson*,<sup>75</sup> the court considered whether a driver's refusal to submit to a breathalyzer test before his attorney arrived constituted refusal under section 322.261 of the Florida Statutes.<sup>76</sup> The court grounded its analysis on the assumption that Florida's implied consent law did not resemble a criminal prosecution; rather, said the court, it was an assertion of the state's right to protect other users of the highways.<sup>77</sup> Characterizing the breathalyzer proceeding as administrative in nature,<sup>78</sup> the court concluded that the sixth amendment right to counsel in criminal cases did not apply.<sup>79</sup> Having disposed of the sixth amendment claim, the court determined that although the defendant had only conditionally refused to take the test, Florida's implied consent law did not sanction conditional refusal.<sup>80</sup>

*Wilson* became authority for another circuit court in *State v. Oliver*.<sup>81</sup> At issue in *Oliver* was whether a driver's reluctance to submit to a breathalyzer test until he could talk to his attorney constituted refusal under Florida's implied consent statute.<sup>82</sup> Persuaded by the logic of *Wilson*, the court held that because the

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73. See, e.g., *Gottschalk v. Sueppel*, 140 N.W.2d 866 (Iowa 1966) (proceeding resulting in revocation of driver's license is administrative rather than criminal; thus, sixth amendment right to counsel does not apply); *Seders v. Powell*, 259 S.E.2d 544, 545 (N.C. 1979) (driver's license revocation proceeding is civil, not criminal). But see *Heles v. South Dakota*, 530 F. Supp. 646, 654 (D.S.D.) (civil-criminal distinction invalid for purposes of determining right to counsel), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982).

74. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

75. 34 Fla. Supp. 141 (Fla. 15th Cir. Ct. 1970).

76. *Id.* at 142.

77. *Id.* at 144.

78. *Id.* at 145.

79. *Id.* The only authority the court cited for the proposition that the sixth amendment right to counsel is inapplicable in administrative proceedings was an annotation in 1 L. Ed. 2d 1865, 1866 (1957).

80. *Wilson*, 34 Fla. Supp. at 146.

81. 47 Fla. Supp. 111 (Fla. 15th Cir. Ct. 1977).

82. *Id.* at 115.

breathalyzer test was a civil rather than a criminal proceeding, the defendant was not entitled to the assistance of counsel; therefore, his desire to forego the test until his attorney arrived constituted refusal.<sup>83</sup>

The lines between the civil and criminal aspects of a breathalyzer proceeding appear to some courts to be less than clear. A United States district court in *Heles v. South Dakota*<sup>84</sup> viewed the alternative results of the proceeding as "inextricably intertwined." The *Heles* court remarked that the major oversight of those courts which had bottomed their decisions on the distinction between civil and criminal proceedings was their failure to acknowledge that the person arrested for DUI is initially detained pursuant to an arrest for a criminal charge.<sup>85</sup> Therefore, the court concluded that "[t]he proceedings are all criminal in nature until testing is actually refused."<sup>86</sup>

Although both sides of the civil-criminal dispute present compelling arguments, the better view is that the *Kirby* decision renders the entire issue moot. Because *Kirby* limited the attachment of the right to counsel to after the initiation of formal charges,<sup>87</sup> a sixth amendment right cannot arise at the moment a driver must decide whether to take a breathalyzer test unless police have already formally charged him. Discussions which focus on what may happen after the driver is charged or the reason why he was initially held in custody fail to grasp this point.

While some courts have found to the contrary,<sup>88</sup> a number of jurisdictions have understood the United States Supreme Court's decisions in *Wade* and *Kirby* to preclude the attachment of any sixth amendment right to counsel prior to the administration of the breathalyzer test.<sup>89</sup> The obstacles imposed by these decisions have hindered those courts that may have seen a need for counsel from a policy standpoint because of the lack of substantive sixth

83. *Id.* at 116-17.

84. 530 F. Supp. 646, 651 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982).

85. 530 F. Supp. at 651.

86. *Id.* at 652.

87. *See supra* note 53 and accompanying text.

88. *See, e.g., State v. Welch*, 376 A.2d 351, 355 (Vt. 1977) (in a serious criminal case, the request to submit to a chemical test can rise to the level of a "critical stage" in the proceedings).

89. *See Seders v. Powell*, 259 S.E.2d 544 (N.C. 1979). The court stated: "We join the majority of our sister states in holding that the operator of a motor vehicle . . . has no constitutional right to confer with counsel prior to a decision to submit to the breathalyzer test." *Id.* at 550 (citations omitted); *see also supra* notes 55-70 and accompanying text.

amendment doctrine on which they could draw. Thus, a recurring problem for courts prior to *Sites* has been how to rest a pretest right to counsel on solid constitutional grounds.

## V. THE DUE PROCESS CLAIM

*Sites*' final claim was that he had a right to counsel under the fourteenth amendment which had been violated when police prevented him from calling his attorney.<sup>90</sup> The court of appeals held that such a right existed<sup>91</sup> under both the fourteenth amendment and Article Twenty-four of Maryland's Declaration of Rights.<sup>92</sup> However, the court chose to restrict the scope of its holding by limiting communication with counsel to situations where it would not cause unreasonable delay in the administration of the breathalyzer test.<sup>93</sup> Because *Sites* could not prove when he had initially requested counsel, the court concluded that his delay in taking the test was potentially unreasonable and thus denial of counsel did not, under the circumstances, violate *Sites*' due process right. Accordingly, the court concluded that the evidence of the breathalyzer should not be suppressed.<sup>94</sup>

Although the court did not set a minimum threshold for determining how much time would constitute an unreasonable delay, it indicated that since Maryland's statute mandates that the test be administered within two hours from the time the driver is stopped, a driver may not exceed the statutory limit in his efforts to contact counsel.<sup>95</sup>

The court added an additional nuance to its holding by providing a standard for courts to use in determining whether the results of a breathalyzer should be suppressed. The standard calls for re-

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90. *Sites*, 481 A.2d at 197.

91. *Id.* at 200.

92. The fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Maryland Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. ANN. CODE art. 24 (1984).

93. *Sites*, 481 A.2d at 200.

94. *Id.* The court noted that the record was unclear as to whether *Sites* had in fact ever made a request for counsel.

95. *Id.* The court stated: "In this regard, it is not possible to establish a bright line rule as to what constitutes a reasonable delay, although the statute itself mandates that in no event may the test be administered later than two hours after the driver's apprehension." *Id.* The Maryland statute proscribes taking a specimen of the driver's blood or breath more than two hours after he is apprehended. MD. CTS. & JUD. PROC. CODE ANN. § 10-303 (1984).

viewing courts to defer heavily to a law enforcement official's ability to gauge whether the test would have been unreasonably delayed by permitting the driver to communicate with counsel.<sup>96</sup> The impact of this standard is twofold. First, after *Sites*, Maryland drivers appear to have the burden of proving that police unreasonably denied them access to counsel. Second, police possess the discretion to deny access to counsel if, in their opinion, permitting such access will result in an unreasonable delay.<sup>97</sup> If a reviewing court finds that this discretion is abused, evidence of the breathalyzer will be suppressed.<sup>98</sup> By contrast, evidence of the tests will be admissible if a court finds that under the circumstances the officer's denial of access was reasonable.<sup>99</sup> In either event, the *Sites* decision will not preclude police from denying a driver access to counsel although their ability to do so will be circumscribed by a standard of reasonableness.

*Sites* relied upon three principal state court decisions to support his due process claim.<sup>100</sup> Only one of these decisions, *State v. Newton*,<sup>101</sup> seems to have provided the court of appeals with any guidance. In *Newton*, the Supreme Court of Oregon found that the fourteenth amendment concept of due process protected an arrestee's freedom to communicate with his attorney.<sup>102</sup> While the court found that the driver's right in that case had been infringed, it chose not to suppress the breathalyzer test evidence on other grounds.<sup>103</sup>

The significance of the *Sites* decision lies in its concept of the events surrounding the breathalyzer test.<sup>104</sup> While other courts

96. *Sites*, 481 A.2d at 200.

97. *Id.* "A reviewing court, however, should afford great deference to the determination of the police authorities that denial of the requested right of access to counsel was reasonably necessary for the timely administration of the . . . test." *Id.*

98. *Id.*

99. *Id.*

100. See *People v. Gurse*, 239 N.E.2d 351 (N.Y. 1968) (denial of driver's access to counsel violated his constitutional rights); *Troy v. Curry*, 303 N.E.2d 925 (Ohio Mun. Ct. 1973) (driver's sixth and fourteenth amendment rights were violated when his request for counsel was denied); *State v. Newton*, 636 P.2d 393 (Or. 1981) (liberty to communicate as embodied in fourteenth amendment allows driver to call attorney before submitting to breathalyzer).

101. 636 P.2d 393 (Or. 1981).

102. *Id.* at 406-07.

103. *Id.* at 407. The Oregon Supreme Court refused to suppress the breathalyzer test results because there was no evidence that counsel could have been any help to the driver. The court stated: "The evidence shows no indication that if defendant had been given the telephone and a few minutes to use it, he would have secured legal advice and, if so, whether the advice would be to take the test or not." *Id.*

104. Cf. *Prideaux v. Dep't of Pub. Safety*, 247 N.W.2d 385 (Minn. 1976) (driver has

have viewed the test as merely a prelude to an administrative hearing,<sup>105</sup> the court of appeals intimated that for purposes of analysis, certain components of the breathalyzer proceeding should be viewed as an actual hearing. This is suggested by the subject matter of several civil cases mentioned by the court of appeals.<sup>106</sup> The unifying theme of these cases is a judicial concern for procedural fairness in hearings.<sup>107</sup> One of these cases was *Goldberg v. Kelly*,<sup>108</sup> to which the court in *Sites* looked for the proposition that the fourteenth amendment right to counsel exists independently from the sixth amendment right.<sup>109</sup>

In *Goldberg*, the Supreme Court recognized that due process requires welfare recipients to be accompanied by counsel prior to termination of their public assistance benefits.<sup>110</sup> In a somewhat different setting, the Maryland Court of Appeals, in *Rutherford v. Rutherford*,<sup>111</sup> held that indigent defendants in civil contempt hearings could not, consistent with fourteenth amendment concepts of due process, be sentenced to incarceration unless given an opportunity to be represented by counsel.<sup>112</sup>

Another Supreme Court case discussed by the court of appeals in *Sites* was *Bell v. Burson*.<sup>113</sup> In *Bell*, the court considered the constitutionality of a Georgia uninsured motorist statute. The statute provided for a driver's license presuspension hearing which excluded any consideration of fault on the part of the driver.<sup>114</sup> Since a significant part of Georgia's statutory scheme involved the issue of liability, the Court concluded that the state could not deprive an individual of his license without a hearing to determine whether

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statutory right to consult with counsel before taking breathalyzer).

105. See *supra* notes 73-89 and accompanying text.

106. *Sites*, 481 A.2d at 199-200. The court of appeals cited *In re Gault*, 387 U.S. 1 (1967). The issue in *Gault* was whether a sixteen-year-old boy's due process rights were violated when he was not appointed counsel in a juvenile delinquency hearing which resulted in his being committed to a state reform school for six years. *Id.* at 7-8.

107. The court of appeals also alluded to several Supreme Court decisions which dealt with procedural fairness in criminal cases. *Sites*, 481 A.2d at 199; see, e.g., *Simmons v. United States*, 390 U.S. 377, 378 (1968) (testimony given by defendant to raise objection that evidence is fruit of unlawful search should not be admissible against him at trial); *Stovall v. Denno*, 388 U.S. 293 (1967) (Court refused to retroactively apply the holdings of *Wade* and *Gilbert* that confrontation is a critical stage requiring presence of counsel).

108. 397 U.S. 254 (1970).

109. *Sites*, 481 A.2d at 199.

110. *Goldberg*, 397 U.S. at 270.

111. 464 A.2d 228 (Md. 1984).

112. *Id.* at 237.

113. 402 U.S. 535 (1971).

114. *Id.* at 536-37.



there was a reasonable possibility that a judgment could be rendered against the driver.<sup>115</sup> Justice Brennan, writing for the majority, acknowledged the serious consequences involved in the suspension of a driver's license:

Once licenses are issued . . . their possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.<sup>116</sup>

By analogizing to the conceptual framework of *Bell*, *Goldberg*, and *Rutherford*—cases that concerned procedural fairness in hearings—the *Sites* decision suggests the desirability of using that framework in evaluating the breathalyzer proceeding. Viewed in this light, the breathalyzer proceeding is an event which can entail the finality of an appearance in court. In this connection, the court of appeals indicated that “revocation of a driver's license may burden the ordinary driver as much or more than the traditional criminal sanctions of fine or imprisonment.”<sup>117</sup>

A due process analysis which juxtaposes the notion of a hearing with that of a breathalyzer proceeding bears several comments. First, the analogy is legitimate to the extent that if a Maryland driver refuses the breathalyzer test, his driver's license is automatically suspended for a minimum of two months.<sup>118</sup> In this respect, a refusal resembles the consequence and finality of a hearing which results in the suspension of a driver's license. Moreover, since breathalyzer test results are highly suggestive to the trier of fact, the chances of a DUI conviction are greatly enhanced for the driver whose blood alcohol level is found to exceed the legal limit.<sup>119</sup> While breathalyzer evidence can sometimes be overcome at trial,<sup>120</sup> this does not detract from the importance of the deci-

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115. *Id.* at 540.

116. *Id.* at 539.

117. *Sites*, 481 A.2d at 199-200.

118. MD. TRANSP. CODE ANN. § 16-205(1)(b)(i), (ii) (Supp. 1984). In the case of a second offense, the statute calls for a minimum suspension of 120 days.

119. A finding in excess of 0.08% level of alcohol in Maryland constitutes prima facie evidence of impairment. MD. CTS. & JUD. PROC. CODE ANN. § 10-307(d) (1984). Section 10-307(e) provides that if the driver's level of alcohol exceeds 0.13% by weight, a prima facie evidence of intoxication arises.

120. MD. CTS. & JUD. PROC. CODE ANN. § 10-308 (1984). This section permits the introduction of other evidence that would tend to prove or disprove whether the driver was le-

sion a driver must make when he is asked to submit to the test.

Second, because the method of analysis chosen by the court of appeals was centered on fourteenth, rather than sixth amendment principles, the court of appeals avoided the constraints imposed by *Kirby* and *Wade*.<sup>121</sup> Finally, by adopting the *Bell* rationale that a driver's license is an entitlement,<sup>122</sup> the *Sites* court avoided the morass of previous decisions which declined to recognize a pretest right to counsel on the basis that a driver's license was a "privilege" rather than a "right."<sup>123</sup>

One ambiguity left unresolved by the *Sites* decision is how law enforcement officers should deal with indigent drivers who may want to confer with counsel. A possible solution to this problem would be to require that police carry the telephone numbers of attorneys willing to defend indigent drivers in addition to carrying the number of the public defender's office. It remains to be seen whether in the aftermath of *Sites* subsequent Maryland case law will work out a solution to this problem.

## VI. CONCLUSION

*Sites v. State* represents an innovative approach to a problem of great public concern. By limiting the pretest right to counsel to a standard of reasonableness, the Maryland Court of Appeals effectively accommodated the public desire to ensure that the breathalyzer test not be unduly delayed, while at the same time protecting the driver who desires informed advice as to whether he should submit to the test. Although the issue of a pretest right to counsel has not yet appeared in a Florida district court, its presence in a number of lower courts in recent years puts that possibility on the horizon.<sup>124</sup> A Florida district court would do well to con-

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gally intoxicated at the time he submitted to the breathalyzer.

121. See *supra* notes 52-72 and accompanying text.

122. *Sites*, 481 A.2d at 200. The language upon which the court of appeals drew originated in *Bell*. Justice Brennan, writing for the majority, stated that the rationale applied in *Bell* was "but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Bell*, 402 U.S. at 539.

123. See *e.g.*, *Campbell v. Superior Court*, 479 P.2d 685, 693 (Ariz. 1971) (a driver has no "right" to refuse the breathalyzer, only the physical power); *State v. Jones*, 457 A.2d 1116 (Me. 1983) (drivers have only the physical power to refuse the breathalyzer test and not the "right" to do so); *Seders v. Powell*, 259 S.E.2d 544, 550 (N.C. 1979) (anyone who accepts the privilege of driving has already consented to take the breathalyzer and has no constitutional right to void that consent).

124. See *supra* notes 66-83 and accompanying text.

sider the *Sites* rationale in deciding what process is due to the driver who feels the need of counsel's advice before he yields to a breathalyzer test.

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